Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. A-515

JOHN D. SCHROEDER,
Appellant,

v.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,
Appellee,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, JOHN L. SCHROEDER, an amateur radio operator, licensed by the Federal Communications Commission and the defendant and appellant below, appeals from the decision of the California Court of Appeal, Second Appellate District, Division Two, filed October 3, 1977, and modified October 13, 1977, which affirmed the Judgment of the Los Angeles County Superior Court, entered June 22, 1976, denying appellant a Peremptory Writ of Prohibition and discharging an Alternative Writ of Prohibition by which appellant sought to prevent his prosecution under a municipal ordinance of the City of Cerritos, California, which limits the height at which he may maintain his amateur radio antenna.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Two, is reported as modified, at 73 Cal.App.3d 841 and 141 Cal.Rptr. 85, and is included herein in Appendix "A."

JURISDICTION

The appeal herein is from a final judgment of the California Court of Appeal, Second Appellate District, Division Two, filed on October 3, 1977, and modified on October 13, 1977, which held that the subject ordinance (a) was not pre-empted by the Federal Communications Act of 1934; (b) did not violate appellant's Freedom of Speech as guaranteed by the First and Fourteenth Amendments of the United States Constitution; and (c) did not deprive appellant of Due Process of Law as guaranteed by the Fourteenth Amendment of the United States Constitution. Although raised as an issue by appellant, the Court did not discuss whether the subject ordinance deprived appellant of Equal Protection of the Law as guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision of the California Court of Appeal affirmed the judgment of the Los Angeles Superior Court, denying appellant a Peremptory Writ of Prohibition and discharging an Alternative Writ of Prohibition, entered June 22, 1976. On November 14, 1977, appellant filed a timely Petition for Hearing in the California Supreme Court, which hearing was denied by order dated December 1, 1977. The notice of appeal herein was filed on December 5, 1977, in the California Court of Appeal, Second Appellate District.

Jurisdiction of this Court is invoked pursuant to Section 1257(2) of Title 28 of the United States Code, this being an appeal which questions the validity of a municipal ordinance of the City of Cerritos, California, Section 22.22.700, Paragraph 21(a) of the Cerritos Municipal Code, on the ground that it is repugnant to the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review by appeal decisions of state appellate courts that sustain the constitutionality of municipal ordinances: *Zucht v. King*, 260 U.S. 164, 43 S.Ct. 24, 67 L.Ed. 194 (1922); *Reinman v. Little Rock, Arkansas*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915); *Atlantic Coast Line R. Co. v. Goldsboro, North Carolina*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914); *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 8 S.Ct. 741, 31 L.Ed. 607 (1888); *Bacon v. Texas*, 163 U.S. 207, 16 S.Ct. 1023, 41 L.Ed. 132 (1896).

The following provisions of the United States Constitution are involved: Article I, Section 8; Article VI, Section 2; Amendment I; and Amendment XIV.

The ordinance involved is Section 22.22.700, Paragraph 21(a) of the Cerritos, California, Municipal Code, which provides as follows:

> "*Radio and Television Antennas:* Radio or television transmission or receiving facilities shall conform to the following provisions: (a) The facilities shall not exceed forty feet in height from ground level or fifteen feet above the roof height, whichever is least, unless permitted by the Planning Commission;"

A copy of the Judgment of the Los Angeles Superior Court, the decision of the California Court of Appeal, Second District, Division Two, affirming said Judgment, the order of the California Supreme Court denying appellant's Petition for Hearing, and the Notice of Appeal

filed by appellant in the California Court of Appeal are included herein in Appendix "A."

QUESTIONS PRESENTED FOR REVIEW

1. If the avowed purpose of a municipal ordinance is to regulate alleged electrical interference from transmissions of federally licensed amateur radio operators, which subject matter has been expressly regulated and pre-empted by the Federal Government, is the ordinance unconstitutional as a violation of federal supremacy?

2. If the avowed purpose of a municipal ordinance is to regulate the aesthetics of a residential community, but the effect of said ordinance is to impair an individual's fundamental right of freedom of speech and/or other fundamental liberties, must the municipality show a "compelling state interest" in order to avoid constitutional infirmity of such an ordinance?

3. Does the subject ordinance violate Article VI, Section 2, of the United States Constitution, in that the subject matter of an amateur radio operator's antenna height has been pre-empted by the Federal Communications Act of 1934 and the Rules and Regulations of the Federal Communications Commission promulgated pursuant thereto? (47 U.S.C. 151, et seq., and 47 C.F.R. Part 95, subpart D, Section 95.437.)

4. Does the subject ordinance violate the First and Fourteenth Amendments of the United States Constitution in that it constitutes a prior and/or continuous restraint on appellant's Freedom of Speech through the instrumentality of his federally licensed amateur radio station?

5. Is the subject ordinance unconstitutional as an improper exercise of the state police power and a violation of the Fourteenth Amendment of the United States Constituion in that it bears no rational relationship to its stated

purpose and deprives appellant of his fundamental right of Freedom of Speech, and a deprivation of his fundamental liberty of the right to enjoy his hobby in his home, as set forth in *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)?

6. Is the subject ordinance unconstitutional in that the regulation of residential aesthetics is insufficient justification for the deprivation or impairment of appellant's fundamental right of Freedom of Speech and the fundamental liberty of the right to enjoy his hobby in his home, as set forth in *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)?

7. Does the subject ordinance violate the Fourteenth Amendment of the United States Constitution in that it deprives appellant of Equal Protection of the Law by discriminating against the class of persons who are amateur radio operators by impairing or depriving them of the fundamental right of Freedom of Speech?

8. Does the subject ordinance violate the First Amendment of the United States Constitution in that it provides no narrow and objective standards or guidelines upon which the local Planning Commission must rely in exercising its discretion to grant or deny a permit to construct or maintain an antenna in excess of the height limitations set forth in the subject ordinance?

STATEMENT OF THE CASE

On November 4, 1975, appellant was served by the local police department with Notice to Appear and was charged with two criminal complaints for alleged violations of the subject municipal ordinance. (C.T. pp. 22-23.)

On November 26, 1975, appellant filed a demurrer to said criminal complaints on the grounds that the subject ordinance was unconstitutional on its face, and as applied,

in that: (1) the subject ordinance of the City of Cerritos is unconstitutional as a violation of Articles VI, Section 2, of the United States Constitution in that it has the effect of interfering with a subject matter that has been occupied and pre-empted by the federal government, to wit: antenna height of an amateur radio operator licensed by the Federal Communications Commission; (2) the subject ordinance of the City of Cerritos violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the California Constitution in that it constitutes a restraint on appellant's freedom of speech; (3) the subject ordinance of the City of Cerritos is unconstitutional as an improper exercise of the police power as applied to appellant, in that its sole objective is the regulation of aesthetics in a residential zone; (4) the subject ordinance of the City of Cerritos is unconstitutional as an improper exercise of the police power in that it bears no reasonable or rational relationship to its stated purpose; (5) the subject ordinance of the City of Cerritos violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the California Constitution in that it deprives appellant of equal protection of the law; and (6) the subject ordinance of the City of Cerritos is unconstitutional in that it provides no objective standards or guidelines upon which the Planning Commission of the City of Cerritos must rely in exercising its discretion to grant or deny a permit to construct an antenna in excess of forty feet.

On January 28, 1976, appellant's motion was denied by the MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT, County of Los Angeles, the Honorable RICHARD S. HANKI presiding. (C.T. p. 120) The criminal cases were consolidated for hearing, Number M62906 and M62907.

On March 22, 1976, appellant filed a Petition for Writ of Prohibition with the Superior Court of the State of California for the County of Los Angeles, seeking to restrain respondent MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT and respondent real party in interest PEOPLE OF THE STATE OF CALIFORNIA from permanently and absolutely exercising jurisdiction in Cases M62906 and M62907. (C.T. pp. 1-128.)

On April 2, 1976, said Superior Court issued to respondent MUNICIPAL COURT and to the PEOPLE OF THE STATE OF CALIFORNIA an Order to Show Cause Why a Peremptory Writ should not issue.

The matter was heard on May 3, 1976, and the Alternative Writ was discharged and the Peremptory Writ of Prohibition was denied. Judgment was entered on June 22, 1976. (C.T. p. 186.)

In his briefs filed in the California Court of Appeal, Second District, Division Two, appellant asked the Court to consider all of the constitutional issues raised in the courts below.

On October 3, 1977, the California Court of Appeal affirmed the judgment of the Los Angeles Superior Court denying a Writ of Prohibition. Although the Court agreed that the subject matter of electrical interference was preempted by the Federal Government, it, nevertheless, held that (a) local governments may regulate the height of amateur radio antennas for ostensible safety and aesthetic purposes; (b) that the ordinance did not deprive appellant of his Freedom of Speech, even though he could not communicate worldwide; and, (c) the statute was not an improper exercise of the police power.

On October 13, 1977, the Opinion of the Court of Appeal was modified, by changing the work "microwave" to "radio" wherever it appeared in the Opinion and by changing the words "microwave transmission" to "radio communication."

On November 14, 1977, appellant filed a timely Petition for Hearing in the California Supreme Court.

On November 21, 1977, at appellant's request, the California Supreme Court stayed all proceedings in the Municipal Court, pending determination of appellant's Petition for Hearing.

On December 1, 1977, the California Supreme Court denied appellant's Petition for Hearing.

On December 5, 1977, appellant filed a Notice of Appeal to the United States Supreme Court in the California Court of Appeal, Second District.

On December 5, 1977, appellant filed a Petition for Stay of Issuance of Remittitur in the California Court of Appeal, Second District, to allow him to file and prosecute an appeal to the United States Supreme Court and avoid his appeal becoming moot should the Municipal Court require a trial of the criminal cases.

On December 7, 1977, appellant's Petition for Stay of Issuance of Remittitur was denied.

On December 12, 1977, appellant requested a stay from the Honorable Justice William H. Rehnquist of the United States Supreme Court to prevent the Municipal Court from bringing him to criminal trial pending the determination of his appeal.

On December 14, 1977, Justice Rehnquist denied appellant's request for stay.

On January 4, 1978, appellant appeared in the Municipal Court and requested a stay pending his appeal to the United States Supreme Court in order that his appeal would not become moot. Appellant was granted a continuance until May 24, 1978, for pre-trial and June 1, 1978, for trial, with the Court stating that appellant may seek a further continuance at that time.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The decision of the California Court of Appeal threatens the effectiveness of amateur radio and citizens band radio communications throughout the United States, and allows a prior restraint and substantial impairment upon the Freedom of Speech of all personal communication radio users.

I

Article I, Section 8, of the United States Constitution specifically authorizes Congress to regulate interstate commerce. It is pursuant to this express power that Title 47 of the United States Code was adopted. The express purpose of the federal law is contained in Section 151 of Title 47 of the United States Code, as follows:

> "For the purposes of regulating interstate and foreign commerce by wire and radio so as to *make available, so far as possible, to all the people of the United States* a rapid, efficient, nationwide and *worldwide* wire and *radio and communication service* . . . there is created a commission to be known as the Federal Communications Commission."
> (Emphasis added.)

Furthermore, one of the important purposes of the Communications Act of 1934 was to provide uniform rules and regulations between the states and communities for the following reasons, as stated in 47 U.S.C. Sec. 307(b):

> ". . . so as to provide a fair, efficient, equitable distribution of radio service to *each* of the several states and communities."
> (Emphasis added.)

This Court had expressly declared that the exclusive jurisdiction and regulatory authority by the Federal Gover-

nment over radio and transmission and communication includes all instrumentalities, facilities, and apparatus used in conjunction therewith. In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 994 (1968) this Court declared:

> "The Act's provisions are explicitly applicable to 'all interstate and foreign communication by wire or radio. . .' (47 U.S.C. Sec. 152(a).)
>
> Indeed, such communications are defined by the Act so as to encompass the transmission of . . . signals, pictures, and sounds of all kinds, whether by radio, or cable, '*including all instrumentalities, facilities, apparatus,* and services (among other things, the receipt, incidental to such transmission."
> (Emphasis added, 392 U.S. 157 at 167, 168.)

Appellant's radio antenna is, indeed, an *instrumentality* and *apparatus* used in his interstate and worldwide radio transmissions and communications, without which radio transmissions and communications are impossible.

The California Court of Appeal is simply incorrect in declaring that the subject ordinance has not been preempted by the Federal Government. Indeed, if the Federal Government, through the Federal Communications Commission, is deemed not to have exclusive jurisdiction over this subject area, the results to amateur radio and other forms of radio communication would be devastating.

47 C.F.R., Part 95, subpart D, Section 95.437, contains the following limitations on antenna height applicable to citizens band operations:

> "(a) All antennas (both receiving and transmitting) and supporting structures associated or used in conjunction with a station operated from

a fixed location must comply with at least one of the following:

(1) The antenna and its supporting structure does not exceed 20 feet in height above ground level; or

(2) The antenna and its supporting structure does not exceed by more than 20 feet the height of any natural formation, tree or man-made structure on which it is mounted; or

(3) The antenna is mounted on the transmitting antenna structure of another authorized radio station and exceeds neither 60 feet above ground level nor the height of the antenna supporting structure of the other station; or

(4) The antenna is mounted on and does not exceed the height of the antenna structure otherwise used solely for receiving purposes, which structure itself complies with subparagraph (1) or (2) of this paragraph.

(5) The antenna is omnidirectional and the highest point of the antenna and its supporting structure do not exceed 60 feet above ground level and the highest point also does not exceed one foot in height above the established airport elevation for each 100 feet of horizontal distance from the nearest point of the nearest airport runway.

The Federal Communications Commission has also placed a general limitation on amateur radio antenna height (200 feet) and has extensively regulated amateur radio antenna height near airports. (47 C.F.R. Section 97.45).

Congress was concerned that if individual states and local communities were allowed to adopt their own rules and regulations, the purpose and objectives of the Federal

Government would be frustrated and a severe burden would be placed upon the effective implementation of the Communications Act of 1934. For example, communications during local and national disasters and emergencies would be seriously curtailed and the "efficiency" of our national radio communications service would be severely hampered by local regulation of radio equipment, transmission, and operation.

The Federal Communications Commission is well aware of the important role of both the amateur radio service and citizens radio service (CB radio) in providing this country and our local communities with radio communication during times of local, national, and foreign disasters, as well as providing medical, health and welfare emergency service, and telephone "patches" for our military and other personnel overseas. It is further aware of the need for uniformity by federal regulation of radio transmissions, equipment and operation because of the obvious national security involved, as well as the other noteworthy benefits which exist and which involve the exercise of freedom of speech, education, advancement of science, and pursuit of one's hobby. Foreign policy and international goodwill are also important considerations for the uniform federal regulation of radio communications.

The issue of state and local regulation of amateur radio antennas has arisen not only in Cerritos, Los Angeles County, California, but throughout the entire United States. The total public body of non-commercial personal radio communication users includes an estimated 11,000,000 Citizen Band (CB) users and 341,000 licensed amateur radio operators. The power of local governmental entities to enact regulations which effectively prohibit worldwide communications, and which impair local communications, is a question of national significance and must be answered by this Court.

II

In addition to the important issue of federal preemption, this case involves the fundamental constitutional right of freedom of speech.

This Court declared in *N.Y. Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140 (1971):

> "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."

As applied to appellant, the subject ordinance constitutes a prior restraint of speech. There is undisputed and uncontradicted evidence in the lower court by expert testimony and results of scientific empirical studies that the subject ordinance adversely affects the distance and reliability of appellant's radio communications, and, furthermore, that the subject ordinance *effectively prohibits worldwide communications.* (C.T., page 117, lines 24-28, 118, lines 1-2, and Appellant's Reply Brief, pp. 20-23.)

The California Court of Appeal failed to apply the rule of constitutional law established by this Court that a *compelling state interest* must be shown by a municipality to justify *any impairment* of appellant's right of freedom of speech. As declared by this Court in *Sherbert v. Verner,* 374 U.S. 398, 406-407, 83 S.Ct. 1790, 1795:

> ". . . It is basic that no showing merely of a rational relationship to some colorable state interest would suffice in this highly sensitive constitutional area, only the gravest abuses endangering paramount interests give occasion for permissable limitation. (citation)"

It is clear in the case at bench that the City of Cerritos has failed to show such a "compelling state interest."

Furthermore, the California Court of Appeal incorrectly applied the "time, place and manner' rationale of *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762 (1940) to the facts presented in the case at bench. While the *Cox* rationale is applicable to cases involving the maintenance of the public order and is generally applied to public speech in the street involving a threat to the safety of the public, the case at bench concerns *pure, protected speech in the privacy of appellant's own home.*

Finally, the subject ordinance goes beyond the regulation of time, place and manner because it severely limits the distance over which appellant's speech can be heard, thus having the effect of interfering with the very purpose and intent of the Communications Act of 1934 by depriving appellant of his ability to engage in *worldwide radio communication*. It is undisputed that even local communication is substantially impaired.

III

This case also raises the substantial First Amendment issue of vagueness and unlimited and unbridled discretion of an administrative body to restrict and impair the Freedom of Speech.

The City of Cerritos argues, however, that adequate guidelines and standards are provided in the ordinance to guide and direct the City Planning Commission in determining whether to grant or deny permits to construct antennas in excess of the height limitations. The purported guidelines and standards cited by the City of Cerritos is Chapter 22.70, Article 4, Residential Streetscape, Section 4.02(2) of the Cerritos Municipal Code, which provides the following purported narrow and objective standards and guidelines.

> "Consideration shall be given to the sequence of roof levels, angles and exposures as viewed from

> an arterial street in order to emphsize attractive roof surfaces and provide *an interesting field of vision.*
> (Emphasis added.)

A determination of what does or does not provide an "interesting field of vision" is something which must necessarily be in the eyes of the beholder, and is therefore totally arbitrary and intangible. Such vague and arbitrary "considerations" simply do not and cannot constitute a narrow, objective and definite standard to guide and govern the Cerritos Planning Commission.

IV

It is the contention of the City of Cerritos that if amateur radio operators desire worldwide communications they have only to live in a commercially zoned area of the City. (Respondent's Reply Brief, p. 17, lines 14-19.) This view is expressed by the City despite uniform case law which holds that the operation of amateur radio and installation of antennas constitutes residential use of property. This raises substantial and fundamental questions that must be answered by this Court, particularly in view of the decision in *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932 (1977). Simply stated, the clear and avowed purpose and effect of the subject ordinance is to create such serious impairment to the operation of amateur and other radio stations in Cerritos as to require said radio operators to move their residences to commercially zoned areas of the City in order to exercise their fundamental right to Freedom of Speech and their liberty of full enjoyment of their home and hobby. This impairment of fundamental rights is perpetrated by the City under the guise of aesthetics.

Moore declares that a municipality may not infringe upon an individual's fundamental constitutional rights under the guise of zoning. This Court emphasized the im-

portance of protecting society from ordinances that intrude or otherwise infringe upon the family and the home, citing *Griswold v. Connecticut*, 381 U.S. at 501, 85 S.Ct. at 1691.

The California Court of Appeals erred in failing to recognize that the subject ordinance deprives appellant of his "individual fulfillment" and "intellectual and emotional needs" satisfied by his exercise of free speech in the operation of his amateur radio in the privacy and enjoyment of his own home and of his right of live where he chooses.

V

Finally, the subject ordinance raises a substantial question of denial of equal protection, to wit: may a municipality arbitrarily discriminate against the class of amateur radio operators under the guise of improving the "aesthetics" of a community.

Appellant contends that since the subject ordinance substantially impairs his fundamental right of freedom of speech and other fundamental liberties, a "strict scrutiny" standard must be applied in reviewing the subject ordinance (*San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 33-38, 93 S.Ct. 1278 (1973), and, furthermore, that the City of Cerritos has failed to demonstrate the necessary "compelling interest" to *justify the deprivation or impairment of appellant's freedom of speech and other fundamental liberties.*

CONCLUSION

The very issues raised in the case at bench are those which are the subject of an estimated 7,000 pending cases in the state courts of virtually every state of the United States. These issues affect virtually each of the 11,000,000 Citizens Band operators and 341,000 amateur radio operators in the country today. In addition to the users and members of the consumer public, manufacturers and distributors of personal communication radio equipment and apparatus are interested parties to the issues before this Honorable Court.

The problems faced by the personal communications public and manufacturers has been described by the national, non-profit, Personal Communications Foundation as a "national legal crisis" which only this Honorable Court can resolve.

It is respectfully submitted that the issues presented by this appeal are substantial and of great public importance. The future of amateur radio and Citizens Band radio is threatened by the subject ordinance and similar ordinances that are being enacted throughout the United States. A decision by this Court is vitally necessary to declare to what extent, if any, state and local government may impair an individual's basic and fundamental constitutional rights in their attempt to regulate radio transmissions and antennas of federally licensed amateur radio and Citizens Band operators. Therefore, this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

FREDERICK J. LAWSON
Counsel for Appellant

March 1, 1978

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

[Filed Oct 3, 1977]

JOHN L. SCHROEDER, Petitioner and Appellant,	)	
v.	)	2D CIVIL
	)	NO. 49806
THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT, Respondent,	)	(Sup.Ct.No. C155 151)
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest and Respondent.	)	

APPEAL from judgment of the Superior Court of Los Angeles County. Arthur K. Marshall, Judge. Affirmed.

Frederick J. Lawson, Esq., for Appellant.

Messrs. J. Kenneth Brown, Ebben and Brown, and Thomas F. Winfield III, for City of Cerritos.

John K. Van De Kamp, District Attorney, Donald R. Wagner, Deputy District Attorney, for Real Party in Interest.

Appeal from a judgment of the Superior Court denying a peremptory writ of prohibition directed against the Los

Cerritos Municipal Court to enjoin prosecution of a municipal zoning ordinance violation. The ordinance in question prohibits in the RS (single family residential) zones any radio or television transmitting or receiving antenna over forty feet in height from the ground or fifteen feet from the roof, whichever is less. Appellant is an FCC licensed amateur radio station operator being prosecuted for having constructed at his home in the RS zone a seventy foot vertical antenna consisting of a crank-up tower encased in concrete. The ordinance in question provides:

> "(21) Radio and Television Antennas: Radio or television transmission or receiving facilities shall conform to the following provisions:
>
> "(a) The facilities shall not exceed forty feet in height from ground level or fifteen feet above the roof height, whichever is least, unless permitted by the planning commission, ..."

The planning commission denied him a permit, stating that his antenna would be out of character with the aesthetics of the neighborhood, would be a visual and aesthetic blight, and would operate contrary to the performance standards of the City of Cerritos relative to electrical interference. Appellant testified that at the forty-foot height his antenna could communicate as far as New York or Hawaii, but that at the extended height it could reach anywhere in the world. He also testified that electrical interference would in fact be 4000 times stronger at forty feet than at the extended height of seventy feet. Appellant appeals the court's denial of a writ of prohibition, contending (1) the ordinance is void because federal regulation of radio transmission under the 1934 Communications Act (47 U.S.C. § 151 et seq.; 47 C.F.R. § 97 et seq.) has pre-empted the field of regulation of radio transmission; (2) the ordinance is an impermissible restriction or a prior restraint on free speech; (3) the ordinance is unreasonable and arbitrary and an impermissible exercise of the police power.

1. On pre-emption, those authorities directly in point dealing with regulation of antenna height hold that local land use regulation of antenna height is permissible and is not precluded by FCC regulation of microwave transmission. (See *Kroeger v. Stahl* (3 Cir. 1957) 248 F.2d 121, permitting an absolute ban on FCC licensed mobile radio stations in residential zones; *Presnell v. Leslie* (1957) 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488, upholding the zoning board's denial of a permit to an FCC licensed amateur radio station operator to construct a forty-foot rotary beam antenna on his home premises; Note, 44 Cornell L.Q. 94, 102 (1958); Note, "State Regulation of Radio and Television," 73 Har.L.R. 386, 395 (1959).) "[L]ocal interest in these towers is maximized because they affect residential property values, aesthetic characteristics, and the physical safety of members of the community." (note, *supra*, 73 Har.L.R. at 395.) Also, an opinion of the California Attorney General concludes that pursuant to its police powers, a chartered city may enact reasonable regulations as to height, location, and method of installation of amateur radio antennas. (Op. No. 71-79, 54 Ops.Atty.Gen. 102 (1971).) The request for that opinion was apparently precipitated by an accident in which one man was killed and four others were injured when they lost control of a 65-foot antenna they were attempting to install on a residential roof and allowed it to strike a high power line. The justification for permitting local regulation of antenna height is that antennas may be a safety hazard, may decrease property values, and may constitue "eyesores." (See Note, *supra*, 44 Cornell L.Q. at 102.)

In a pre-emption case the fundamental inquiry is whether local legislation will conflict with national policy; if the activity is of predominantly local interest then state action may be permissible, but if a uniform national rule is necessary then federal pre-emption will be implied. (*California v. Zook* (1949) 336 U.S. 725, 728; *R.E. Spriggs*

Co. v. Adolph Coors Co. (1974) 37 Cal.App.3d 653, 658.) The fundamental rationale for the Communications Act of 1934 (47 U.S.C. §§ 151 et seq.) is based on the fact that the number of available radio frequencies is finite, and therefore, Congress must exercise its power over interstate commerce to allocate available frequencies and control their use. (*Federal Communications Commission v. Sanders Brothers Radio Station* (1940) 309 U.S. 470, 474.) Unquestionably, federal legislation has pre-empted local regulation of microwave transmission, including assignment of frequencies, interference phenomena, and the content of broadcast material. (See, e.g., *Allen B. Dumont Laboratories Inc. v. Carroll* (E.D. Penna. 1949) 86 Fed. Supp. 813, aff'd. 184 F.2d 153, cert. denied 340 U.S. 929; *United States v. Southwestern Cable Co.* (1968) 392 U.S. 157; *Standard Radio and Television Co. v. Chronicle Publishing Co.* (1960) 182 Cal.App.2d 293.) As stated, existing authority regarding regulation of antenna height has found sufficient local interest to sustain local regulation. Also, the federal regulation of amateur radio operators (47 C.F.R. §§ 97 et seq.) reveals no detailed regulation of antenna height, but rather one blanket limitation on height to 200-foot (47 C.F.R. § 97.45), plus extensive height regulation of antennas in the vicinity of airports. The FCC has not exhibited concern over antenna height where airport safety is not involved. By contrast, many detailed regulations govern the assignment of frequencies and the prevention of interference phenomena (see e.g., 47 C.F.R. §§ 97.73, 97.131, 97.133), and there can be no doubt that federal regulation has pre-empted control in those areas.

Appellant's contention that the 1934 Act foreclosed all local regulation of microwave transmission is simply incorrect. Each case turns on whether local regulation has invaded the exclusively national sphere under the principles set forth above, or whether it involves a matter of local con-

cern that does not require a uniform rule. In addition to authorities such as *Kroeger v. Stahl, supra,* (3 Cir. 1957) 248 F.2d 121, which uphold land use regulation of antenna height, local regulation of other aspects of microwave communication has been sustained. For example, local authorities may regulate franchising and rate making for the cable television industry, provided the regulation is reasonable (*Greater Fremont Inc. v. City of Fremont* (N.D. Ohio 1968) 302 F.Supp. 652, 660); and they may regulate professional advertising on a local radio station (*Head v. New Mexico Board of Examiners in Optometry* (1963) 374 U.S. 424, 429-31).

Appellant asserts that the only reasons given by the planning commission in denying him a permit were aesthetic considerations and the problem of electrical interference, and that the FCC has pre-empted the latter area. His assertion that the FCC's detailed regulation of interference phenomena has pre-empted that aspect of regulation of micro-wave transmission is correct, and this ground does not constitute a valid reason to prevent him building an antenna more than forty fee high. But it is irrelevant to the reasonableness of an ordinance that the legislators had improper motives or purposes (*McCarthy v. Manhattan Beach* (1953) 41 Cal.2d 879, 894), and it is even less relevant that a member of the planning commission advanced an impermissible ground in denying a permit. The question is whether there is any rational justification for the ordinance, and because valid considerations to support local regulation of antenna height exist, the ordinance is not pre-

empted by federal regulation by reason of the planning commission's misapprehension of its powers.[1]

2. We turn to the question whether the ordinance is an invalid regulation of appellant's freedom of speech and expression under the First and Fourteenth Amendments. The well-established rule is that reasonable, narrowly-drawn statutes may regulate the time, place, and manner of expression, but that blanket prohibitions of expression are invalid (*Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 867-69), as are overbroad statutes or those without clearcut standards (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 305; *Remer v. City of El Cajon* (1975) 52 Cal. App. 3d 441; *Dulaney v. Municipal Court* (1974) 11 Cal.3d 77; *Van Nuys Publishing Co., Inc. v. City of Thousand Oaks* (1971) 5 Cal.3d 817). Judged by these standards the instant ordinance is constitutional. It does not restrict amateur radio transmission throughout the city, but only in the residential zone; it does not prohibit all transmission even there, for although appellant cannot transmit throughout the globe he can apparently communicate within a radius of 2500 miles.

Appellant contends the ordinance is invalid because it prescribes no standards whereby he can obtain a variance from the City Council allowing construction of an antenna higher than forty feet. He has cited no cases, nor are we aware of any, requiring that a variance be provided when the basic ordinance is reasonable in its effect. In *Dillon*, the court struck down an ordinance requiring a permit for a parade and prescribing no standards whereby a permit

[1]Appellant, as stated, testified that interference would become less with increasing antenna height, and the therefore asserts that the regulation cannot be justified on any rational basis. We agree that as a regulation of interference phenomena the ordinance would be invalid; but there are other justifications for limiting antenna height, such as safety and aesthetic factors. Problem sof interference generated by the lower height of the antenna must be resolved within the context of the federal regulations cited in the text.

could be obtained; there, the form of expression under scrutiny was absolutely prohibited, subject to the arbitrary discretion of local officials. Here, by contrast, appellant can construct an antenna up to forty feet high and can communicate throughout a wide area. Such an ordinance is not unconstitutional on its face as a restraint on freedom of speech. Appellant's cited cases on this point all involve blanket prohibitions of forms of expression; posting notices on utility poles, in *Dulaney;* distributing handbills and circulars, in *Van Nuys Publishing;* setting up newsracks on the streets, in *Remer.*

3. In support of his argument that the ordinance is an invalid exercise of the police power, appellant contends the only real justification for the ordinance is aesthetic, which is an insufficient basis to deprive him of the use of his property (citing *Varney and Green v. Williams* (1909) 155 Cal. 318, 320). In regulating land use, municipalities have broad discretion to prescribe zoning restrictions, which will be stricken only if clearly arbitrary and unreasonable and without substantial relation to public health, safety, or morals. (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 388-89; *Nectow v. City of Cambridge* (1928) 277 U.S. 183; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1; *Young v. American Mini Theaters* (1976) 427 U.S. 50, 62-3; *Moore v. East Cleveland* (1977 ____ U.S. ____, 52 L.Ed.2d 531, 536-37.) Economic and aesthetic grounds are permissible considerations for exercise of the police power. (*Burke v. Municipal Court* (1964) 229 Cal.App.2d 696, 701-02 (sustaining prohibition of commercial signs in residential area).) Even in *Varney and Green, supra,* the 1909 case which holds that artistic taste provides an insufficient basis for land use regulation, the court stated that the height of a billboard might be regulated for safety reasons, and that the manner of erecting and using billboards might also be regulated, even though their erection could not be entirely prohibited. (155 Cal. at 321.) Similarly here, possible safety considerations, economic factors, and aesthetic factors all

support local regulation of the height of antennas and manner of their installation. Appellant contends, however, that since the planning commission did not mention either safety or economic factors in its letter of rejection, its only justification for refusing him a permit was aesthetic, and that regulation of land use may not be based solely on that reason. Given that the instant ordinance is reasonably justifiable on its face, the burden rests on appellant to show the ordinance has been unfairly applied to him. The letter of denial is insufficient evidence to compel reversal. The trial court looked at pictures of the antenna and the surrounding vicinity and concluded that the commission had acted properly. Absent some solid evidence of the safety of the antenna and its neutral impact on local property values, we cannot conclude that application of the ordinance was unreasonable or arbitrary. Appellant relies on the following evidence: the commission's original issuance of a permit, which was then quickly revoked; appellant's assertion that the antenna is safe; the letter of the planning commission which does not mention safety. Even if we were to accept appellant's premise that aesthetic considerations alone may not justify land use regulation — which we do not — appellant has not sufficiently shown that other considerations do not support application of the ordinance to him.

Courts have recognized that economic and aesthetic considerations may be closely interwoven, and they have granted broad discretion to local authorities to regulate residential land use in order to stabilize economic and social aspects of a neighborhood and to promote aesthetic considerations, family environments, and basic residential character. (See *Sechrist v. Municipal Court* (1976) 64 Cal.App.3d 737, 746-47, permitting an ordinance banning junk storage on premises in an R-1 zone.) Commercial signs in residential areas may be banned. (*Burke v. Municipal Court, supra,* 229 Cal.App.2d 696.) A municipality may limit dwelling occupancy to family units of related in-

dividuals. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1; *Moore v. East Cleveland* (1977) ____ U.S. ____, 52 L.Ed.2d 531.) Since restriction of antenna height to forty feet is a less drastic regulation than any of these, we think such restriction neither unduly burdensome nor unreasonable.

The judgment of the trial court is affirmed.

CERTIFIED FOR PUBLICATION.

FLEMING, Acting P.J.

We concur:

COMPTON, J.
BEACH, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JOHN L. SCHROEDER,	)	2D CIVIL
	)	NO. 49806
Petitioner and Appellant,	)	(Super.Ct.No.
	)	C155 151)
v.	)	ORDER OF
	)	MODIFI-
THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,	)	CATION
	)	
Respondent,	)	
	)	
THE PEOPLE OF THE STATE OF CALIFORNIA	)	
Real Party in Interest and Respondent.	)	

[Filed Oct. 13, 1977]

THE COURT:

Good cause appearing heretofore, the opinion in the above matter, filed October 3, 1977, Certified for Publication, is modified by deleting the word "microwave" and inserting the word "radio" in its stead, on the following pages: p. 3, line 18; p. 5, line 6; p. 6, lines 9, 22.

And, modified by deleting the words "microwave transmission" and inserting the words "radio communication" in its stead, on page 6, line 2.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN L. SCHROEDER,
Petitioner,
NO. C 155 151

vs.

THE MUNICIPAL COURT OF THE
LOS CERRITOS JUDICIAL DISTRICT,
Respondent,

PEOPLE OF THE STATE
OF CALIFORNIA,
Real Party in Interest.
) JUDGMENT

The above-entitled matter came on for trial on April 21, 1976, in Department 70 of the above-entitled Court before the Honorable Arthur K. Marshall, Judge Presiding, upon the Petition for Writ of Prohibition of Petitioner JOHN L. SCHROEDER and exhibits thereto and the Answer and Return to Petition for Writ of Prohibition.RFREDERICK J. LAWSON appeared as attorney for Petitioner. J. KENNETH BROWN, City Attorney for the City of Cerritos and EBBEN AND BROWN by THOMAS F. WINFIELD, III, appeared as attorneys for Real Party in Interest, the City of Cerritos. JOHN VAN de KAMP, District Attorney and DONALD R.

WAGNER, Deputy District Attorney, by DONALD R. WAGNER, appeared for the People. The exhibits to the petition were received in evidence.

The Court having examined the written memoranda filed by the parties, and having heard argument of counsel and being fully advised,

IT IS ORDERED, ADJUDGED AND DECREED, that the Alternative Writ is discharged requested Preemptory Writ of Prohibition is denied.

The Clerk is directed to enter this Judgment.

/s/ Marshall
Judge of the Superior Court

6/21/76

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

DEC 1 - 1977

I have this day filed Order RECEIVED

DEC 5 1977

FREE HEARING DENIED IN

In re: 2 Civ. *No.* 49806
Schroeder

vs.
Municipal Court, Los Cerritos Judicial District

Respectfully,

G. E. BISHEL
Clerk

80487-877 4-77 3M OSP

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IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

JOHN D. SCHROEDER, Petitioner and Appellant, vs. THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT, Respodnent and Respondent. PEOPLE OF THE STATE OF CALIFORNIA Real Party In Interest.	)	2nd CIVIL NO. 49806 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES [United States Supreme Court Rules, Rule 10]

NOTICE IS HEREBY GIVEN that JOHN SCHROEDER, the petitioner and appellant herein, hereby appeals to theSupreme Court of the United States from the final judgment and Opinion of this Court entered on October 3, 1977, and modified on October 13, 1977, affirming the decision of the Los Angeles Superior Court entered on June 22, 1976, in Book 7139, page 214 of the Judgment Book, a hearing on which was denied by the California Supreme Court on December 1, 1977.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

DATED: December 5, 1977.

/s/ F. J. Lawson
FREDERICK J. LAWSON
Attorney for Appellant

(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the

In the above entitled action or proceeding. I have read the foregoing

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on (Date) at (Place) California

(Signature)

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

15233 Ventura Boulevard, Suite 414, Sherman Oaks, CA 91403

On December 5, 77, I served the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (United States Supreme Court Rules, Rule 101, in compliance with United States Supreme Court Rule 33(3)(c)

on the parties

in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sherman Oaks, California

addressed as follows:

Please see attached Exhibit "A" incorporated by reference herein.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 5, 1977 (Date) at Sherman Oaks (Place) California

Subscribed and Sworn to Before Me
this 5th day of December, 1977.

Alan R. Zuckerman
(Signature)
ALAN R. ZUCKERMAN

OFFICIAL SEAL
Dorothy J. Stuckey
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 11, 1980

BEST COPY AVAILABLE

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77-1220

Supreme Court, U. S.
FILED
MAR 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. A-515

JOHN D. SCHROEDER,

Appellant,

vs.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,

Appellee,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal From the Court of Appeal, Second Appellate District, of the State of California.

Motion to Dismiss Appeal From State Court (Pursuant to Supreme Court Rule 16(1)(b)).

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IN THE

Supreme Court of the United States

October Term, 1977
No. A-515

JOHN D. SCHROEDER,

Appellant,

vs.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,

Appellee,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal From the Court of Appeal, Second Appellate District, of the State of California.

Motion to Dismiss Appeal From State Court (Pursuant to Supreme Court Rule 16(1)(b)).

Appellee, the Municipal Court of the Los Cerritos Judicial District, and Real Party in Interest, the People of the State of California and the City of Cerritos, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth:

Statement of Case.

This case involves an appeal from a decision of the California Court of Appeal, Second Appellate District, Division Two, filed October 3, 1977, and modified October 13, 1977, which affirmed the judgment of the Los Angeles County Superior Court, Appellate Division, entered on June 22, 1976, denying appellant a peremptory writ of prohibition by which appellant sought to prevent his prosecution under a Municipal Code of the City of Cerritos, California, which limits the height to which radio and television antennas may be erected in residential zones. Section 22.22.700 of the City of Cerritos Development Code provides in pertinent part as follows:

> *22.22.700 Site development standards.* . . . the following standards shall apply to residential development in the RS zones:
>
> * * *
>
> (10) BUILDING HEIGHT: The building height shall be no greater than thirty-five feet;
>
> * * *
>
> (21) RADIO AND TELEVISION ANTENNAS: Radio or television transmission or receiving facilities shall conform to the following provisions:
>
> "(a) The facilities shall not exceed forty feet in height from ground level or fifteen feet above the roof height, whichever is least unless permitted by the planning commission,
>
> (b) The facilities shall be attached to the main building and any guy wires shall be anchored only to the main building (Ord. 428 §3, 1972; Ord. 344 §5 (part), 1972). (C.T. 156)."

ARGUMENT.

1. The Judgment Herein Appealed From Rests on Adequate Nonfederal Bases.

It is respectfully submitted that the judgment herein appealed from by the appellant rests on adequate nonfederal bases. As this Honorable Court stated in the case of *Henry v. Mississippi*, 379 U.S. 443, 446-447, 13 L.Ed.2d 408, 412, 85 S.Ct. 564 (1965):

> "It is, of course, a familiar principle that this *Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions.* The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429, but also in cases involving procedural state grounds. . . . [Citations omitted]. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this court, we *have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions.*" (Emphasis added).

The California Court of Appeal, Second Appellate District, Division Two, 73 Cal.App.3d 841 (1977) rejected appellant's contention that the federal regulation of radio transmission under the 1934 Communica-

tions Act (47 U.S.C. §151 *et seq.;* 47 C.F.R. §97 *et seq.*) had preempted the field. The Court, at page 845, cites several cases and a California Attorney General Opinion which concludes that pursuant to its police powers, a chartered city may enact reasonable regulations as to height, location and method of installation of amateur radio antennas. (Opn. No. 71-79, 54 Ops. Cal. Attny. Gen. 102 (1971).). The Court indicated that the request for the Attorney General's opinion was precipitated by an accident where by one man was killed and four others were injured when they lost control of a 65-foot antenna they were attempting to install. The Court stated as follows at page 845:

> "The justification for permitting local regulation of antenna height is that antennas may be a safety hazard, may decrease property values, and may constitute 'eyesores', . . . [reference omitted]."

The Supreme Court in the case of *California v. Zook,* 336 U.S. 725, 728, 93 L.Ed. 1005, 1008, 69 S.Ct. 841 (1949) stated that if the local activity is of predominantly local interest then state action may be permissible. The Court went on to observe that "existing authority regarding regulation of antenna height has found sufficient local interest to sustain local regulation." (*Id.* at 846). It concluded that since "valid considerations to support local regulation of antenna height exist, the ordinance is not preempted by federal regulation. . . ." The considerations referred to by the Court were delineated at page 848 as follows:

> "Similarly here, possible safety considerations, economic factors, and aesthetic factors all support local regulation of the height of antennas and the manner of their installation."

And, at page 849 it went on to state:

> "Courts have recognized that economic and aesthetic considerations may be closely interwoven, and they have granted broad discretion to local activities to regulate residential land use in order to stabilize economic and social aspects of a neighborhood and to promote aesthetic considerations, family environments, and basic residential character."

The Court's decision clearly rested on adequate state grounds.

In closing, it must be emphasized that this Court in the cases of *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974) and *Moore v. East Cleveland,* ..... U.S. ....., 52 L.Ed.2d 531, 97 S.Ct. ..... (1977) upheld the right of a municipality to limit occupancy to family units of related individuals. Certainly, a city can restrict the size of television and radio antennas to a height which it concludes is in the best interests of the general public because it makes the community safer or more attractive.

2. The Judgment Herein Appealed From Fails to Raise Any Substantial Federal Question.

The decision of the California Court of Appeal herein accurately describes the vast preemptive power of the federal government. In upholding the subject local regulation that Court cited and relied upon existing federal court decisions supporting its conclusion. There is no decisional law—state or federal—which holds that local land use regulation of antenna height has

been preempted by the Federal government in its adoption or implementation of the Communications Act of 1934, 47 U.S.C. §515 *et seq.*

Conclusion.

Based on the foregoing reasons, appellee and Real Party in Interest respectfully submit that the judgment appealed from by the appellant clearly rests on adequate nonfederal bases, fails to present any substantial federal question and that this appeal should be dismissed.

Dated: March 31, 1978.

Respectfully submitted,

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77-1220

Supreme Court, U. S.
FILED
MAR 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. A-515

JOHN D. SCHROEDER,
Appellant,

v.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,
Appellee.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

ON APPEAL FROM THE
COURT OF APPEAL, SECOND APPELLATE DISTRICT
OF THE STATE OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED IN SUPPORT OF JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. A-515

JOHN D. SCHROEDER,
Appellant,

v.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,
Appellee.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

ON APPEAL FROM THE
COURT OF APPEAL, SECOND APPELLATE DISTRICT
OF THE STATE OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED IN SUPPORT OF JURISDICTIONAL STATEMENT

The American Radio Relay League, Incorporated (hereinafter the League), pursuant to Rule 42 of this Court and with the consent of the parties, respectfully submits a brief *amicus curiae* in support of the jurisdictional statement of appellant.

INTEREST OF AMICUS CURIAE

The League is the nationwide non-profit organization of amateur radio operators of the United States and Canada, with 130,000 amateurs in the United States licensed by the

Federal Communications Commission and 5,400 amateurs in Canada licensed by the Department of Communications as full voting members. The purposes of the League, as stated in its Articles of Association, include the following:

> . . . . the promotion of interest in amateur radio communication and experimentation; the relaying of messages without charge; the furtherance of the public welfare; the advancement of the radio art; the fostering and promotion of intercommunication by electronic means for the benefit of the members and without pecuniary gain; [and] the fostering of education in the field of electronic communications. . . .

The League's headquarters office is in Newington, Connecticut.

PRELIMINARY STATEMENT

The Amateur Radio Service in the United States operates under rules and regulations of the Federal Communications Commission (hereinafter the Commission or FCC), pursuant to Article 41 of the Radio Regulations of the International Telecommunication Union (Geneva 1959), to which the United States is a signatory, and the Communications Act of 1934, as amended, 47 USC §151 *et seq.*

There were 345,223 licensed amateur stations in the United States at the end of 1977, most of which are authorized to operate in six frequency bands below 30 MegaHertz (MHz).[1] In addition, more than 11,000,000 Citizens Band (CB) stations[2] are licensed by the FCC to

[1]FCC News Release of February 23, 1978, No. 97362.

[2]*Budget Estimates, Fiscal Year 1979, Federal Communications Commission.*

operate in a single frequency band centered at 27 MHz.[3] For administrative purposes, the FCC has placed both the Amateur Radio Service and the CB Radio Service under the Personal Radio Division, Safety and Special Radio Services Bureau.

An antenna is a necessary part of every transmitting station; without it power cannot be radiated and communications cannot be conducted. Particularly on the frequencies employed by amateur and CB stations, an outdoor antenna is essential. Two general rules relating to antennas are (1) the size of the antenna varies inversely with the operating frequency, and (2) the range and reliability of communication increases as the height of the antenna above ground increases.

Efforts of municipalities to regulate the installation and operation of amateur radio stations by enactment and enforcement of zoning regulations have been generally unsuccessful. The highest courts of a number of states, including Minnesota, New Jersey, Pennsylvania and Arizona, have held that installation and operation of amateur radio stations and their antennas are incidental or accessory uses of residential property which cannot be limited by zoning ordinances.[4] The precedents established in those states have been followed by the lower courts of several other states, including Ohio, Maryland and Texas.[5] Only in New

[3]There are more than 25,000,000 CB transceivers (combination transmitters and receivers) in the hands of the public according to the FCC. All members of a single family, even the children, may operate a CB station under a single license, and one license may cover more than one transceiver. 47 CFR§95.465(b)(2). Thus, it appears that as many as 50,000,000 persons may be engaging in CB operations in the United States.

[4]*Village of St. Louis Park v. Casey,* 218 Minn. 394, 16 N.W.2d 459 (1944); *Appeal of Lord,* 368 Pa. 121, 81 A.2d 533 (1951); *Wright v. Vogt,* 7 N.J. 1, 80 A.2d 108 (1951); *Town of Paradise Valley v. Lindberg,* 27 Ariz. App. 70,551 P.2d 60 (1976).

[5]*Dettmar v. County Board of Zoning Appeals,* 28 Ohio Misc. 35, 273 N.E. 2d 921 (1971); *Zoning Board v. Marshall,* 387 S.W. 2d 60 (1975).

York has the highest court held that the installation of an antenna of an amateur radio station is an impermissible use of residential property.[6] The only state to follow New York has been Washington.[7]

ARGUMENT

I. A PREVAILING FEDERAL RULE IS NECESSARY TO PREVENT A MULTIPLICITY OF CASES AND CONFLICTING OPINIONS.

Interference to reception has been a problem since the earliest days of radio, and became even more of a problem with the widespread use of television and high-fidelity sound systems in the home following World War II. Amateur stations were involved in a high percentage of the complaints of interference in the early television days because the stations were located in nearby residences. Fortunately, however, the total number of complaints was relatively small because the amateur stations were scattered and some distance from most homes. Almost all of the interference problems were solved by the cooperative efforts of the amateurs, local service technicians, and the receiver owners, by implementing relatively simple procedures developed by the League and television receiver manufacturers.

The explosive growth of the CB service in the last three years has generated a corresponding increase in the number of complaints, usually to television reception, but at times to hi-fi systems, AM radio, public address systems, electronic organs, and other home-entertainment devices.

[6] *Presnell v. Leslie*, 3 N.Y. 2d 384, 165 N.Y.S. 2d 488, 144 N.E. 2d 381 (1957).

[7] *State ex rel. Carpenter v. City of Everett Board of Adjustment*, 7 Wash. App. 930, 503 P.2d 1141 (1972).

Most CB operators have been unable to eliminate the interference because, unlike amateur operators, they have not received training on radio theory and good technical practice.[8]

Often in frustration the neighbors demand that their governmental officials take some action to eliminate the interference. In response, many city councils and their counterparts have adopted, as part of zoning ordinances, severe restrictions in the size and height of outdoor antennas, apparently not realizing that the FCC has the expertise and authority to take corrective action.[9] A few ordinances have prohibited all antennas.[10]

The League receives an average of fifteen to twenty calls and letters a week concerning attempts by local authorities to restrict or prohibit amateur radio operation by adoption or enforcement of zoning ordinances. Litigation involving the lawfulness of zoning ordinances and building codes

[8] Every amateur radio operator, after rather intensive study, has passed an FCC examination on radio theory. A CB license is issued to anyone 18 years or older who completes and files with the FCC a simple form listing his name and address.

[9] Local legislators have failed to recognize or understand that the possibility of interference to television receivers and other electronic devices in nearby homes decreases as the height of the antenna above ground increases. Some legislators introduced ordinances to prohibit the operation of amateur and CB stations when interference was encountered even though the cause of the interference in at least forty-five percent of the cases involved poor design of the television receivers. *Industrial Communications, October 8, 1977*, p. 16.

[10] An ordinance prohibiting all antennas, even indoor, without a special use permit has been enacted by the City of Northglenn, Colorado. The prohibition even applies to all forms of television antennas, even the widely used "rabbit ears". An appeal is awaiting the decision of the Supreme Court of Colorado; ***Baysinger, et al. v. City of Northglenn***, Supreme Court of Colorado, No. 27477.

when applied to amateur stations and their absolutely necessary antennas is pending in almost every state.[11] Only a small percentage of zoning board decisions adverse to amateurs reach the courts, largely, the League is informed, because an appeal is costly.[12] Nevertheless, the number of cases on appeal is increasing each month.

In an attempt to bring about uniformity in at least one state, a Vermont senator has introduced a bill which would prohibit municipalities from regulating "federally licensed Amateur Radio Service antennas and their supporting materials" unless the municipality's legislative body reasonably finds that the installation presents a safety hazard to life or property.[13]

A ruling by this Court will serve to put local authorities on notice that operation of amateur radio stations is a federal matter over which the federal government, by and through the enactment of the Communications Act of 1934, has preempted jurisdiction, and that local ordinances which restrict the effective operation of amateur radio stations violate the supremacy clause, Article VI, Section 2, of the Constitution of the United States.

[11]The Personal Communications Foundation, a non-profit tax-exempt California organization established in 1976 for the purpose of creating a comprehensive collection of court decisions, briefs and legal memoranda for use by attorneys engaged in amateur radio and CB litigation, has estimated that, in 1976, there were more than 7,000 legal matters involving all aspects of non-profit personal communications (amateur and CB), as compared to only 200 in 1956.

[12]Many are teenagers and students with limited resources when they become radio amateurs.

[13]Vermont Senate Bill 233 introduced by Senator Doyle, Washington County.

II. THE RADIO LICENSING FUNCTION OF THE FEDERAL GOVERNMENT HAS BEEN INVADED BY LOCAL ORDINANCES REQUIRING APPLICATIONS ACCOMPANIED BY FEES AND EXTENSIVE HEARING PROCEDURES.

Zoning Ordinances usually provide for the filing of applications for variances, special use permits, or other waivers, followed by a hearing before the city council, zoning board or other official or body. An increasing number of ordinances require the payment of more than a nominal fee with the application. A high percentage of the ordinances provide no guide lines, standards or other criteria to assist an applicant in submitting material, to guide the official or board in reaching a decision, and to aid a reviewing court in reaching a determination as to whether the action was arbitrary or capricious. The procedures often are so complex to a layman that the services of an attorney are necessary for the applicant to have a reasonable chance of success. Costs of several hundreds of dollars are not unusual.

For a radio amateur, who is interested in radio as a hobby and without pecuniary interest,[14] such costs and procedures are or may be an unreasonable burden. As long ago as 1927, a local ordinance imposing a license requirement upon radio stations was held to be invalid. *Whitehurst v. Grimes*, (D.C. Ky. 1927) 21 F.2d 787. See also *Allen B. DuMont Laboratories v. Carroll*, (E.D. Penna. 1949) 86 F. Supp. 813, affirmed 184 F.2d 153, *certiorari denied*, 340 U.S. 929 (1949).

The use of zoning ordinances and hearings on applications for variances, special use permits, and other

[14]Section 3(q) of the Communications Act of 1934, as amended, 47 USC §153(q), defines an Amateur Station as "a radio station operated by a duly authorized person interested in radio techniques solely with a personal aim and without pecuniary interest."

waivers to regulate, restrict and sometimes effectively prevent the establishment and operation of amateur radio stations is a relatively recent development. As shown in the preliminary statement, the first reported attempt was in 1944. *Village of St. Louis Park v. Casey, supra.*

Assumption of authority by a city council or zoning board to regulate the height, size, configuration or location of the antennas of amateur (or CB) radio stations carries with it the authority to reduce the antennas to a size that they become unusable,[16] or indeed to ban them altogether. Such restrictions silence or restrict amateur and CB operators just as effectively as would local legislation canceling or modifying licenses issued by the FCC. As surely as the power to tax is the power to destroy, the power to regulate antennas is the power to invalidate authority granted pursuant to the Communications Act of 1934.[17]

An opinion by the Supreme Court of the United States holding that the use of zoning ordinances and related hearings in a manner which effectively reduces the communications capability of an amateur radio station is an invasion of the licensing function of the Federal Government is necessary to limit zoning ordinances to the proper and permissible application of the police power of the municipality.

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[16]In *The People of the State of New York v. Klein*, Village Court, Incorporated Village of Mimsey Park, Nassau County, an amateur radio operator, who had been issued a building permit to erect a tower, was found guilty of violating a zoning ordinance which limited the width of an antenna to six feet. Sentence, consisting of a fine, was imposed February 9, 1978. An appeal is contemplated.

[17]The League does not take issue with the authority of local councils, zoning boards, etc., to regulate where commercial use might occur or where serious concerns of the safety of life and property are involved, but this is not the situation in the majority of antenna restriction cases nor in the case at bench. *Kroeger v. Stahl*, (3rd Cir. 1957) 248 F.2d 121, often relied upon by municipalities, involved an attempted commercial use of residential property.

III. NATIONAL UNIFORMITY ON FEDERAL PREEMPTION IN CASES OF INTERFERENCE IS NECESSARY.

The California Court of Appeal correctly held in the instant case:[18]

> Unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, *interference phenomena*, and the control of broadcast material. (See, *e.g., Allen B. DuMont Laboratories, Inc. v. Carrol* (E.D. Penna. 1949) 86 F. Supp. 813, aff'd 184 F.2d 153, cert denied 840 U.S. 929, 71 S. Ct. 490, 95 L. Ed. 670; *United States v. Southwestern Cable Co.* (1968) 392 U.S. 157, 88 S. Ct. 1994, 20 L.Ed. 2d 1001; *Standard Radio and Television Co. v. Chronicle Publishing Co.* (1960), 182 Cal. App. 2d 293, 6 Cal. Rptr. 246). (Italics supplied).

In an unreported case in Phoenix, Arizona,[19] involving a complaint of interference by a CB operator to television reception in violation of a residential restriction against unsightly antennas, a jury awarded $18,000.00 compensatory damages and $30,000.00 punitive damages and assessed court costs and plaintiff's attorney's fees against the CB operator. Even though the award of damages was set aside by the trial judge, in excess of $10,000.00 in attorney's fees and court costs remained. Unable to finance an appeal or pay the assessed fees and costs, the CB operator filed for bankruptcy.

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[18]*Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal. App. 3rd 841, 141 Cal. Rptr. 85.

[19]*Avenida Hermosa Townhouse Association No. 2, Glenn A. Brockman, Rover E. Ryan and Gloria Ryan v. Harry S. Redecker, Jr.*, Superior Court of Arizona, County of Maricopa, Case No. C-303, 393.

In a somewhat similar case in Las Vegas, Nevada, an action for damages for causing interference to television reception was brought against an individual who was both a licensed amateur operator and a licensed CB operator.[20] A motion to dismiss the complaint for lack of jurisdiction because of federal preemption was denied. After the expenditure of several thousand dollars by the defendant and the filing of a counter-complaint alleging malicious prosecution, the plaintiffs dismissed. The counterclaim remains for trial.

Typical of cases pending in several states is an action for damages based upon allegations of interference to television reception and hi-fi equipment by the operation of an amateur radio station in Springfield, New Jersey.[21] Pretrial conferences have not been concluded.

The number of actions against amateur and CB operators based upon interference will increase until the Court rules that the supremacy clause, Article VI, Section 2, of the United States Constitution, is controlling. In a news release accompanying a report of the FCC's Field Operations Bureau released in October, 1977, the following estimates of interference complaints were given:

> In Fiscal Year 1976, a lower bound on the number of individuals experiencing interference to TV reception associated with the operation of CB stations probably lies somewhere between one and ten million, with the best estimate being *four million* persons. Projections for Fiscal Year 1979 are that between 3-21 million persons (best

[20] *Frank Anthony Joy and Denna Lynn Joy v. Clarence R. Wilson and Betty L. Wilson.* Eighth Judicial Court of Nevada, County of Clark, Department VI, Case No. A-159, 672.

[21] *Charles Gerst and Margaret Gerst v. Donald Jellinek.* Superior Court of New Jersey, Chancery Division, Union County, No. AL 9753-4 (filed June 28, 1977).

> estimate — *9 million*) will experience TVI associated with CB radio operation. (Italics supplied).[22]

The number of actual complaints to the FCC is considerably less. In remarks in support of legislation to require manufacturers of television receivers and other home entertainment devices to incorporate adequate filtering and shielding in their products, Senator Barry Goldwater, an active amateur, said on March 2, 1977:

> FCC field offices actually received over 100,000 complaints last year and, based upon the ever-expanding number of complaints it is currently receiving, projects that over 200,000 will come in during fiscal year 1978.[23]

Even though the figures are for interference almost entirely from CB operations, the similarity between CB and amateur installations makes most restrictive ordinances and court opinions equally applicable to both services.

Interference to television reception is a federal, not a local, problem. Even though most of the complaints result from operation of CB stations, operation of transmitters in other radio services — broadcast, police, taxicab, industrial and business, to name a few — can cause such interference. A solution cannot be found in local legislation.

A ruling by the Court on federal preemption in cases of alleged and actual interference to radio and television reception by amateur and CB radio stations is necessary to (1) provide much needed uniformity among the Courts of the several states, (2) resolve the substantial conflict now existing between the state courts, and (3) provide guidelines

[22] Report FCC/FOB/PD&E 77-02.

[23] 123 Congressional Record, No. 36.

to the hundred or more municipalities now considering some form of regulation restricting amateur radio and CB operators.

CONCLUSION

The regulation and licensing of all radio stations, including amateur and CB, are the responsibility of the Federal Communications Commission. Nevertheless, local authorities continue to invade the field by the adoption and enforcement of zoning ordinances and related application procedures which so limit the height and size of outdoor antennas in residential areas as to substantially restrict the effective operation of the amateur stations.

Many such ordinances have been adopted in an effort to reduce or eliminate interference to television reception, even though the field has been preempted by the federal government. Numerous challenges to the legality of the ordinances are pending throughout the United States.

In addition, private actions brought under a variety of theories are pending in many states as the result of interference, usually from amateur and CB stations to television reception. Federal preemption is a threshhold question in many such actions.

Consideration of these questions by the Supreme Court of the United States is essential to prevent further invasion by local authorities into a field preempted by the federal government, and to bring about uniformity of decisions of courts of all fifty states.

The public interest will be served by assumption of jurisdiction.

Respectfully submitted,

THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

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March 1, 1978

APPENDIX
IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. A-515

JOHN D. SCHROEDER, Appellant, vs. THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT, Appellee. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	CONSENT TO FILING OF AMICUS CURIAE BRIEF OF THE AMERICAN RADIO RELAY LEAGUE

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above amicus curiae brief may be filed in this proceeding with the Supreme Court of the United States.

DATED: 1/31/78

J. KENNETH BROWN, City Attorney
THOMAS F. WINFIELD, City Attorney
EBBEN, BROWN, WINFIELD AND CANZONERI

By /s/ Thomas F. Winfield
THOMAS F. WINFIELD
On Behal of the CITY OF CERRITOS
Appellee

DATED: 2-7-78

JOHN K. VAN DE KAMP, District Attorney
TIM HANSEN, Deputy District Attorney

CERTIFICATE OF SERVICE

Please show service on: (3 copies to each)

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